

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

BENSLEY CONSTRUCTION, INC,  
on its own behalf and on behalf  
of all others similarly situated,

Plaintiff,

v.

Civil Action No. 05-11249-GAO

MARSH & MCLENNAN COMPANIES, INC.,  
MARSH, INC., ACE USA, ACE INA, AMERICAN  
INTERNATIONAL GROUP, AMERICAN RE-  
INSURANCE COMPANY, ARTHUR J.  
GALLAGHER & CO., HILB ROGAL & HOBBS,  
COMPANY, WILLIS GROUP HOLDINGS, LTD.,  
WILLIS NORTH AMERICA, INC., WILLIS  
GROUP LTD., UNIVERSAL LIFE RESOURCES,  
INC. (d/b/a ULR INSURANCE SERVICES, INC.),  
THE CHUBB CORPORATION, USI HOLDINGS,  
INC., METLIFE, INC. PRUDENTIAL  
FINANCIAL, INC., UNUMPROVIDENT  
CORPORATION, THE ST. PAUL TRAVELERS  
COMPANIES, INC. ZURICH AMERICAN  
INSURANCE COMPANY, LIBERTY MUTUAL  
GROUP, INC., LIBERTY MUTUAL INSURANCE  
COMPANY, LIBERTY MUTUAL FIRE  
INSURANCE COMPANY, EMPLOYERS  
INSURANCE COMPANY OF WAUSAU and ST.  
JAMES INSURANCE COMPANY LTD.,

Defendants.

**MOTION TO DISMISS OF DEFENDANTS LIBERTY MUTUAL INSURANCE  
COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY AND  
EMPLOYERS INSURANCE COMPANY OF WAUSAU**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants Liberty  
Mutual Insurance Company, Liberty Mutual Fire Insurance Company and

Employers Insurance of Wausau (collectively "Liberty") hereby move to dismiss the claims asserted by plaintiff Bensley Construction, Inc. ("Bensley") on its own behalf and on behalf of all others similarly situated, for failure to state claims against Liberty. As its reasons therefor, and as explained in detail in the accompanying memorandum of law, Liberty states:

There is no basis for Bensley's claims against Liberty for recovery for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty because Liberty, as an insurer, owes no such duty to Plaintiffs, as alleged insureds, as a matter of law.

There is no basis for Bensley's claim against Liberty for unjust enrichment because that is a theory of recovery that exists only when a contract exists and is not performed fully.

There is no basis for Bensley's claim against Liberty for breach of contract and breach of the covenant of good faith and fair dealing because Bensley fails to allege that Liberty and plaintiffs are parties to any contract, let alone one that was breached and caused damages to plaintiffs. In the absence of a contract, Bensley's claims for breach of contract and the covenant of good faith and fair dealing, which does not arise absent a contract, must fail.

WHEREFORE, Liberty respectfully requests that the Court dismiss all claims asserted by plaintiff against Liberty pursuant to Fed.R.Civ.P 12(b)(6).

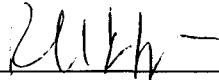
Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY,

LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

EMPLOYERS INSURANCE COMPANY OF  
WAUSAU, and

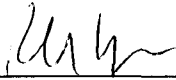
By their attorneys,

  
\_\_\_\_\_  
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Dated: July 8, 2005

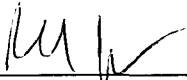
LOCAL RULE 7.1 CERTIFICATION

I hereby certify that we have conferred with counsel for plaintiff by telephone on July 8, 2005, and the parties were unable to resolve the issues presented in this motion.

  
\_\_\_\_\_  
Ralph T. Lepore, III

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party on the attached service list by first class mail on July 8, 2005.

  
\_\_\_\_\_  
Ralph T. Lepore, III

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